APPENDIX 1

Memorandum Judgment Sought to Be Reviewed.

NOT TO BE PUBLISHED—SEE LOCAL RULE 8 (f)

UNITED STATES COURT OF APPEALS
For the District of Columbia Circuit

No. 81-2021

CENTURY AIR FREIGHT, INC., Petitioner

v.

CIVIL AERONAUTICS BOARD, Respondent
AMERICAN AIRLINES, INC., Intervenor

[No Opinion]
September Term, 1981
CAB 81-7-138
United States Court of Appeals
for the District of Columbia Circuit
FILED APR 21 1982
GEORGE A. FISHER
Clerk

Petition for Review of an Order of the Civil Aeronautics Board.

Before WRIGHT, TAMM, and GINSBURG, Circuit Judges.

JUDGMENT

This cause came on to be heard on a petition for review of an order of the Civil Aeronautics Board approving the terms of a settlement between intervenor American Airlines and the Board's Bureau of Compliance and Consumer Protection. The issues have been briefed and argued by counsel, and the court has accorded them full consideration. They do not occasion a need for an opinion. *See* Local Rule 13(c).

Petitioner has asserted that the Board made several errors of law and abused its discretion in approving the settlement at issue in this case. We find petitioner's claims meritless. The terms of the settlement do not authorize American Airlines to operate an overnight, all-cargo flight between New York and San Juan in violation of Section 404(b) of the Federal Aviation Act, 49 U.S.C. § 1374(b) (1976). Nor was there error in allowing American Airlines to refuse reasonable requests for sevice on such a flight. 14 C.F.R. § 291.31(a)(2) (1980); *see Nat'l Small Shipments Traffic Conference* v. *CAB*, 618 F. 2d 819, 831-832 (D.C. Cir. 1980). Neither the Board nor the Bureau was required to resolve petitioner's antitrust claims if, given the terms of the settlement, further proceedings were not in the public interest. We note that the order under review expressly states that it is not intended to prejudice petitioner's pending suit against American, and the order does not state or imply that American's conduct between 1971 and 1981 did not violate the antitrust laws. In all other respects as well, the Board's order is free from reversible legal error, and is supported by substantial evidence in the record.

On consideration of the foregoing, it is ORDERED and ADJUDGED by this court that the petition for review is hereby dismissed.

Per Curiam
For the Court
GEORGE A. FISHER
George A. Fisher
Clerk

APPENDIX 2

Order of Civil Aeronautics Board Affirming Consent Order of Law Judge, July 29, 1981 (Annexing Settlement Agreement, Appendices "A" and "B").

Order 81-7-138

UNITED STATES OF AMERICA
CIVIL AERONAUTICS BOARD
WASHINGTON, D.C.
Adopted by the Civil Aeronautics Board
at its office in Washington, D.C.,
on the 29th day of July, 1981

SERVED JUL 1981

Docket 37278

AMERICAN AIRLINES, INC. NEW YORK-SAN JUAN CARGO SERVICE

Enforcement Proceeding

ORDER

This enforcement proceeding against American challenged the legality of American's method of allocating reserved container space on its overnight New York-San Juan all-cargo flight. In the complaint instituting this case the Bureau of Compliance and Consumer Protection (the Bureau) asserted that American's longstanding method of allocation violated Section 404(b) of the Federal Aviation Act, 49 U.S.C. 1374(b), which prohibits unjust discrimination. Before a hearing was held the Bureau and American agreed on a settlement of this case. That settlement was approved by Administrative Law Judge John M. Vittone in Order 81-4-116 (April 17, 1981). One air freight forwarder in the New York-San Juan

market, Century Air Freight (Century), opposed the settlement below and has now petitioned us to reverse the law judge's approval of it. For the reasons given below, we have determined that his decision should be affirmed.

The flight at issue here, American flight number 841 from New York to San Juan, has twelve container positions on the main deck of the B-707 aircraft used for the flight. This overnight flight is attractive to air freight forwarders and other shippers because it provides them next-morning delivery in San Juan. As a result, the number of container positions has long been inadequate to meet the demand for such space. From 1971 to 1978 American allocated eight of the twelve positions to Profit by Air, Inc., three to Shulman Air Freight, and one to Emery Air Freight. When Shulman withdrew from the market in 1978, seven forwarders, including Century, asked for a reserved position. American gave one each to Air Express International Corporation, Burlington Northern Air Freight, Inc. and Bor-Air Freight. Earlier, in 1977, American allocated the equivalent of a container position ot Century, but Century has alleged that its shipment have often broken out of their container, thus subjecting Century to a higher frequency of loss and more trouble in taking its cargo off the plane in San Juan. While Century had requested a reserved container position numerous times, it was never able to obtain one.

The administrative law judge approved the settlement since he found that it provided a fair resolution of the case, Order 81-4-116, p. 3:

> [The agreed-upon allocation system] addresses whatever effects American's practice might have had on the route, guarantees a fair opportunity to all shippers to compete for access to American's service, and is also tailored to meet American's legitimate business needs. The system limits all reservations to one

year and requires American to consider applications each year from all forwarders and shippers using basically the same criteria, regardless of whether they have previously held reservations on the flight. All shippers who tender shipments for the relatively less sought after northbound segment will be guaranteed at least one reserved southbound position, and all remaining positions will be allocated according to criteria which take into account this and other factors affecting American's likely yield.

He found unwarrated Century's concerns that the settlement would give American unbridled discretion in allocating space or allow it to unlawfully discriminate against Century.

Century has petitioned for review of his approval of the settlement, a petition opposed by American and Emery Air Freight.[1] Century charges that the settlement allows American to continue "an illegal unbridled exercise of customer selection and rejection" in violation of Sections 404(b) and 411 of the Act. Century also asserts that the settlement "would validate the prior exclusionary and discriminatory practices of customer selection and rejection" causing the issuance of the Bureau's complaint, since "it requires no change whatsoever in the anticompetitive practices of American * * * and the southbound allocation for northbound shippers makes no change in the actual practices [previously] prevailing * * *." In addition, according to Century, the settlement violates the antitrust laws. American's New York-San Juan flight is an "essential facility" under the reasoning of *Hecht* v. *Pro-Football Inc.*, 570 F.2d 982 (D.C. Cir., 1977), since

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[1] Emery, which has held one of the container positions on American's New York-San Juan flight, is participating in this case pursuant to Rule 214 of the Board's Rules of Practice, 14 C.F.R. 302.214.

access to reserved container space on that flight is vital to any forwarder's ability to compete in the New York-San Juan market.[2] As a result, the Sherman Act prohibits any settlement which would allow American to arbitrarily allocate space on that flight. Finally, Century asserts that the settlement "would validate the prior exclusionary and discriminatory practices of customer selection and rejection" since "it requires no change whatsoever in the anticompetitive practices of American * * * and the southbound allocation for northbound shippers makes no change in the actual practices [previously] prevailing * * *."

As a result, Century filed an antitrust suit in federal district court against American in which Century sought treble damages for, *inter alia*, American's alleged unlawful refusal to give Century more space on the New York-San Juan flight. Because of American's intention to seek dismissal of the suit on the ground that the Board had jurisdiction, Century stipulated that the case should be referred to the Board under the doctrine of primary jurisdiction. The district court then stayed further proceedings while the Board investigated Century's allegations.

After informally investigating American's conduct, the Bureau determined that American's allocation of space on flight no. 841 appeared to violate Section 404(b) of the Act and filed the complaint instituting this proceeding. The Bureau's complaint requested that American be ordered to cease and desist from allocating space on the flight in violation of Section 404(b), to institute a

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[2] In the *Hecht* case a professional football team allegedly used a condition in its stadium lease to block an applicant for another football franchise in the same city from using the stadium, the only one in the metropolitan area suitable for football, so as to maintain its monopoly in the market. There the court held that a business could not keep competitors from using an essential facility on fair terms if the facility could not be duplicated.

reasonable method of allocating space and to pay civil penalties. While the Bureau believed that American also may have engaged in an unfair competitive practice in violation of Section 411 of the Act, 49 U.S.C. 1381, the Bureau chose not to include such a charge in its complaint. Instead the Bureau advised Century's counsel that he could either file a complaint based on that charge here if he wished the Board to investigate that issue or renew his antitrust claims in the district court proceeding on completion of the Section 404(b) Board proceeding. Century's counsel chose the latter alternative.

In response to the Bureau's complaint American denied that it had acted unlawfully in its allocation of space on the New York-San Juan flight. Among other things, American alleged that its allocation of space was required by economic factors, such as its need to give preference to those forwarders who provided freight for the return flight from San Juan to New York, a flight for which there was relatively little demand.

Before any hearing was held, however, American and the Bureau agreed to settle the case without further litigation. While not admitting that the allegations in the Bureau's complaint were true, American agreed to contest neither their validity nor tht findings and conclusions in the proposed consent order. American also agreed to pay $50,000 in civil penalties and to adopt a new method of allocating space on the New York-San Juan flight. In brief, American will grant all forwarders and shippers at least one reserved container position on the New York-San Juan flight if they regularly use one such position on tht return flight from San Juan to New York, allocate the remaining positions according to various economic criteria set out in the settlement agreement, and review these allocations annually. The settlement was opposed by Century, which argued that it gave American too much

discretion in allocating container space in violation of both the Act and the Sherman Act. In response, the Bureau and American contended that the settlement would not give American such unbridled discretion.

In response, American asserts that the allocation method specified by the settlement agreement satisfies the requirements of Section 404(b). In addition, the "essential facility" doctrine of antitrust law is allegedly inapplicable to a service provided by a person who does not compete with the persons using the facility, and in any event the antitrust issues presented by American's practice were not before the Board and should be heard by the district court.

In our view, Century's objections do not provide a basis for disapproving the settlement between the Bureau and American. Since there is more demand for reserved container positions than there are positions, American obviously must use some method of allocating the available positions among the shippers requesting them. The method agreed upon by American and the Bureau appears to us to satisfy the requirements of Section 404(b) and therefore to be a fair means of settling this case. We disagree with Century that the settlement gives American unlimited discretion in allocating container space. Thus each forwarder using a space on the northbound flight receives a space on the southbound flight. American must allocate the remaining space on the basis of such economic criteria as the weight and type of cargo likely to be tendered by each applicant, the applicant's ability to tender cargo for the northbound flight, and other factors affecting the revenues and costs of American's New York-San Juan service. In addition, American must repoen the allocation annually and thus can not follow its earlier practice of maintaining position reservations for years without change. We therefore agree with the law judge's

conclusion that "[n]othing in the allocation system authorizes or makes it easier for American to select customers unlawfuly or improperly, and substantial limitations have been placed upon American's discretion to ensure against unjust discrimination," Order 81-4-116, p. 3. Furthermore, other than charging that the settlement gives American unlimited discretion, Century has not explained how the settlement's allocation method will injure it, nor has Century suggested any alternative means of allocating container positions which would be both fair and practicable.

We also disagree with Century's contention that the settlement validates American's prior practice, for it requires American to allocate space according to certain specified criteria and to pay $50,000 in civil penalties. American will no longer be able to follow its prior allocation practices. In addition, this settlement does not purport to determine whether or not Century should prevail in its private suit against American.

Finally, Century's contention that American has been violating the Sherman Act does not require disapproval of the settlement. As agreed to by Century's counsel at the beginning of this proceeding, this case concerns only the allegation that American had violated Section 404(b)'s prohibition against unjust discrimination. The antitrust issues presented by Century's district court suit, on the other hand, were never encompassed within this proceeding. Those issues were reserved for trial in the district court suit. Accordingly, Century's antitrust claims provide no basis for disapproving the settlement before us.

Accordingly, the Board affirms the approval of the settlement agreed to by American Airlines, Inc. and the Bureau of Compliance and Consumer Protection.

By the Civil Aeronautics Board:

Phyllis T. Kaylor
Secretary

(Seal)

All Members concurred.

APPENDIX 2 (ANNEXES)

Settlement Agreement—Appendix A, Memorandum of Agreement.

BEFORE THE
CIVIL AERONAUTICS BOARD
WASHINGTON, D. C.

AMERICAN AIRLINES, INC.
NEW YORK-SAN JUAN CARGO SERVICE
Enforcement Proceeding

Docket 37278

MEMORANDUM OF AGREEMENT

The Bureau of Consumer Protection ("Bureau") and the respondent, American Airlines, Inc. ("American") by their respective attorneys agree, solely for the purpose of settling this proceeding without the need for further litigation, as follows:

1. American and the Bureau consent to entry by the Civil Aeronautics Board of a final order in the form of the draft order attached to this memorandum.

2. American neither admits nor contests any of the facts alleged in the Bureau's complaint in this docket, and it neither admits nor contests any of the findings of fact, characterizations and inferences drawn from such facts, or the conclusions of law stated in the draft Consent Order.

3. It is the intention, understanding and agreement of American and the Bureau that neither this memorandum, the Consent Order, nor any facts, conclusions or inferences contained therein shall have any collateral estoppel or *res judicata* effect outside this Board proceeding. For

this purpose, "this Board proceeding" means the present enforcement action by the Bureau in Docket 37278, and does not include the private action now pending in the Southern District of New York against American by Century Air Freight, Inc. ("Century"), or any other action except for an action by the Board for enforcement of the Consent Order to be entered herein. Without limiting the foregoing, American and the Bureau further specifically intend that neither this memorandum, the Consent Order, nor any of the facts, conclusions or inferences contained therein shall have any collateral estoppel or *res judicata* effect, or be used as evidence of any violation of law, in that private action.

4. American agrees to pay $50,000 in full settlement of all alleged violations by American described in the Bureau's complaint and the Consent Order.

5. American expressly acknowledges that the Consent Order to be entered restrains it from engaging in certain practices regarding allocation of reserved main deck "A" container space on its overnight New York to San Juan all-cargo service and contains affirmative duties regarding future such practices, and American consents to be bound thereby.

6. American waives all right to notice, hearing and appeal in connection with the entry of the Consent Order.

7. In the event the Board should seek to enter the Consent Order in a future proceeding or court action to enforce the Consent Order, American shall be precluded from disputing the findings and the conclusions of law contained in the Order, or the validity of the Order itself.

8. The Bureau shall submit this agreement and the attached draft order to the Administrative Law Judge assigned to this proceeding in accordance with Rule 215

of the Board's Rules of Practice, together with a motion requesting approval and entry of the Order pursuant to the authortiy delegated under 14 C.F.R. 385. American waives its right under Rule 215(b) to submit further written comments on the settlement except in response to comments submitted by persons other than the Bureau.

9. The Bureau agrees that it will not initiate any additional enforcement action against American based upon the method of allocating reserved main deck "A" container positions on Flight No. 841 at issue in this proceeding.

10. It is understood that American may, consistent with the requirements of the allocation system contained in Appendix B to the Consent Order, allocate reserved main deck "A" container positions on Flight No. 841 to Century as part of any resolution of the private suit now pending between American and Century.

11. This agreement is subject to approval by the Board, and if such approval is withheld, the agreement shall be terminated and have no further effect.

AMERICAN AIRLINES, INC.

By: MARTIN FREDRIC EVANS
Andrew C. Hartzell, Jr., Esq.
Martin Frederic Evans, Esq.
Debevoise, Plimpton, Lyons
& Gates

Date: August 19, 1980

BUREAU OF CONSUMER PROTECTION

By: JAMES D. TUSSING
James D. Tussing, Esq.
Senior Trial Attorney

Date: 8/12/80

APPENDIX 2 (ANNEXES)

Settlement Agreement—Appendix B, Allocation System

APPENDIX B

ALLOCATION SYSTEM

Until December 31, 1984, American Airlines, Inc. (American) will follow the procedures outlined below for allocating Confirmed Air Freight ("CAF")[1] A container mand for CAF A container positions exceeds the number of positions available:

(1) American will keep a record of all requests for daily CAF A container space on Flight No. 841 from freight forwarders and shippers.

(2) Each January American will contact each forwarder and each shipper which has requested but not been accorded such space in the preceding calendar year and will determine whether and to what extent that forwarder or shipper desires daily CAF A container space for the entirety of the next 12-month period. American will not be obligated to consider requests for A container space on less than a daily, year-round, fully-rated (general commodity rate) basis.

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[1] Confirmed Air Freight is American's name for freight carried for others on a recurring basis pursuant to reservations, as described more fully in paragraph (7), *infra*.

positions on its New York to San Juan all-cargo Flight No. 841, or any successor service[2] concerning which de-

[2] Hereafter, the term "Flight No. 841" is used to refer to the flight which is currently so designated, and to any successor service. The term "successor service" refers to any American all-freight flight which replaces or supplements the current Flight No. 841 and which is regularly scheduled to provide overnight delivery of freight from New York, New York to San Juan.

(3) American will then evaluate each such request as well as similar requests from any forwarder or shipper which has been accorded CAF A container space on a recurring basis during the prior year and will allocate CAF A container space on Flight No. 841 according to the following procedure:

(A) American will evaluate each request for CAF A reference to the following factors:

(i) the applicant's financial stability and credit worthiness, as determined by its payment record with American (if any) and other factors normally used in making such an assessment;

(ii) the credibility of the applicant's request based on:

(a) if the applicant has previously been accorded CAF space on Flight No. 841 or on other American flights, the consistency and nature of the applicant's utilization of such space;

(b) the applicant's prior utilization of space on other New York-San Juan flights;

(c) the volmue of the applicant's current shipments of freight between New York and San Juan; and

(d) any other relevant facts presented by the applicant or known to American.

(B) To the extent permitted by CAF space on Flight No. 841, American will allocate one standard CAF A container position[3] for one year to each shipper or

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[3] A standard CAF A container position shall be capable of transporting intact a shipper-tendered A container.

forwarder which requests one or more such positions, which offers to provide American northbound return-flight freight on a daily, year-round full-rated (general commodity rate) A container basis, and which meets American's criteria of credibility and credit worthiness, as outlined in subparagraph (A) above.

(C) American will allocate for one year any remaining CAF A container positions based upon the following factors, as they affect revenues and costs:

(i) the anticipated average weight, density, rate and type of shipments to be tendered by the applicant;

(ii) the applicant's ability and willingness to supply American with northbound, return-flight freight; and

(iii) such other factors pertaining to the applicant's shipments of freight between New York and San Juan which affect American's revenues or costs on any of its flights between New York and San Juan.

(4) American will also use the procedure established herein to allocate any CAF A container space which becomes available during the year. Such allocations shall run until the next annual reallocation takes place.

(5) In determining who will be allocated CAF A container positions, American will not favor applicants which have held or are holding such positions on Flight No. 841 over applicants who have not held such positions. However, American may consider such prior usage in assessing an applicant's credibility, creditworthiness and the potential yield of the applicant's shipments, as set forth in subparagraphs (3)(A) and (3)(C).

(6) American will not be obligated under this allocation system to continue to operate Flight No. 841, to continue to operate Flight No. 841 on its current schedule, or to make any alternative arrangements for shippers or forwarders using Flight No. 841 in the event of termination of the flight or a schedule alteration.

(7) In accordance with the standard operation of American's CAF procedures, a CAF allocation will not constitute a commitment by American to carry any such freight or a commitment by the shipper to tender any such freight. If a shipper or forwarder accorded a position does not tender freight in substantially the amount of its allocation and in accordance with normal air freight business practices, or otherwise fails to satisfy the criteria established in the preceding paragraphs, American may withdraw the allocation at any time.

APPENDIX 3

Consent Order of Law Judge April 17, 1981

UNITED STATES OF AMERICA
CIVIL AERONAUTICS BOARD
WASHINGTON, D. C.

Issued Under Delegated Authority
April 17, 1981

Order 81-4-116

Docket 37278

SERVED APR 22 1981

AMERICAN AIRLINES, INC.
NEW YORK-SAN JUAN CARGO SERVICE

Enforcement Proceedings

CONSENT ORDER

The Bureau of Consumer Protection ("Bureau")[1] commenced this proceeding on December 14, 1979, alleging that American Airlines, Inc. ("American") violated section 404(b) of the Federal Aviation Act by unjustly discriminating against various air freight forwarders in allocating space in its New York-San Juan overnight cargo flight, currently designated American's Flight No. 841. The Bureau alleged that American's manner of allocating space on this flight caused public injury by preventing development of a fully competitive freight forwarding service between New York and San Juan. The complaint requested that American be ordered to cease

[1] On December 15, 1980 the Bureau of Consumer Protection became the Bureau of Compliance and Consumer Protection.

and desist from allocating space on Flight No. 841 in an unjustly discriminatory manner, to institute reasonable allocation practices with respect to main deck "A" container space on this flight, and to pay civil penalties. American answered denying the substantive allegations of the Bureau's complaint and specifically denying any violations of the Act.

On August 12, 1980, prior to any adjudication of facts, American and the Bureau entered into a memorandum of agreement (Appendix A to this Order) to settle this matter without the need for further litigation. American has not admitted any of the allegations of the Bureau's complaint; but solely for the purposes of settlement, American has agreed for this proceeding not to contest the allegations stated in the Bureau's complaint or the findings and conclusions set forth in this Consent Order. American has also agreed, for purposes of settlement, to adopt the proposed allocation procedures set forth in Appendix B to this Consent Order. The statement of those procedures in Appendix B is controlling, but they can be summarized as follows. American will: (1) grant all forwarders and shippers which will regularly utilize at least one "A" container position on the less desirable northbound return segment of the flight at least one reserved container position on the southbound, New York-San Juan segment; (2) allocate the remaining positions on the southbound segment, if any, according to the criteria set out in Appedix B; and (3) review and issue or reissue such allocations once a year. American has also agreed to pay $50,000 in full settlement of any civil penalty liability.

The Bureau alleges the facts to be as follows. Since 1971, American has operated the only regularly scheduled, overnight all-cargo service on week nights from New York to San Juan (originally designated Fight No. 801, now Flight No. 841). Access to this service is desirable for

air freight forwarders competing, or seeking to compete, on this route because the flight is scheduled so that shippers in New York can have next morning delivery in San Juan. However, since 1971, various forwarders have held allocations of indefinite duration for all twelve of the main deck "A" type cargo container positions in the Boeing 707 aircraft American has used in this operation. From late 1971 through mid-1978, all twelve such positions available were allocated to three forwarders—eight to Profit By Air, Inc., three to Shulman Air Freight, and one to Emery Air Freight. In August 1978, when Shulman withdrew from this route, seven forwarders asked American to take Shulman's place, seeking a total of between nine and eleven positions. The three Shulman positions were subsequently divided among Air Express International Corporation, Burlington Northern Air Freight, Inc., and Bor-Air Freight.

The Bureau has further alleged that during the period from 1971 to 1977, Century Air Freight, Inc. ("Century"), an air freight forwarder based in New York, made numerous requests for positions on American's flight. Each Century request during that period for an indefinite allocation of "A" container space was denied on the ground that all available space was committed. In May 1977, Century sued American in Federal District Court in New York, claiming that American had engaged in an unlawful restraint of trade in violation of the Sherman Act by agreeing with Profit By Air to deny Century space, and that American's actions also violated the Federal Aviation Act. In September 1977, American allocated Century the equivalent of one "A" container position on Flight No. 841. However, Century contends that its freight has often been broken out of its container and fitted into whatever space is available on the aircraft, subjecting Century to greater recovery time and higher

frequency of loss than if its freight were containerized. In August 1978, Century sought unsuccessfully at least one of the three Shulman positions then available.

This matter came to the Bureau's attention when American and Century stipulated that certain issues should be referred to the Board under the doctrine of primary jurisdiction. At the parties' request, the District Court stayed further judicial proceedings pending action by the Board on Century's complaint. Following an investigation, the Bureau filed its complaint in this proceeding.

The complaint alleges specifically that since American began its overnight all-cargo service from New York to San Juan in 1971, American has allocated to a few forwarders all the desirable positions on these flights—namely the main deck "A" container positions—for an indefinite period. When American allocates such a position to a forwarder, that forwarder has a right to the position as against any other forwarder, until such time as American or the forwarder alters the arrangement. Such alterations are rare, however. From late 1971 to mid-1978, the same three forwarders held all twelve standard main deck "A" container positions on the flight. The Bureau contends that this indefinite preference for some forwarders for an extensive period of time, and indefinite exclusion of others seeking the American service, violates section 404(b).

American has denied any violation of section 404(b) and has raised affirmative defenses to the Bureau's complaint. American does not admit the legal or factual contentions of the Bureau. However, for the purposes of settling this proceeding, and subject to the conditions and limitations of the memorandum of agreement, American consents to the entry of this Consent Order.

Therefore, on the basis of the Bureau's factual and legal contentions, and American's agreement not to contest

them in this proceeding, we find that American violated section 404(b) in its indefinite allocations of space on Flight No. 841. *Transcontinental Bus System, Inc.* v. *C.A.B.*, 383 F.2d 466 (5th Cir. 1967), cert. denied, 390 U.S. 920 (1968); *Emery Air Freight and Air Midwest, Inc.*, Order 73-4-8 (April 2, 1973). We also find that the allocation system which American has agreed to implement in order to settle this proceeding will provide a fair resolution of this particular case. It addresses whatever effects American's practice might have had on the route, guarantees a fair opportunity to all shippers to compete for access to American's service, and is also tailored to meet American's legitimate business needs. The system limits all reservations to one year and requires American to consider applications each year from all forwarders and shippers using basically the same criteria, regardless of whether they have previously held reservations on the flight. All shippers who tender shipments for the relatively less sought after northbound segment will be guaranteed at least one reserved southbound position, and all remaining positions will be allocated according to criteria which take into account this and other factors affecting American's likely yield.

Century has objected to this settlement on the stated grounds that the allocation system grants American "a right of unbridled customer selection", and would permit American to discriminate against Century in violation of the antitrust laws and common carrier obligations. We find no basis for these objections. Nothing in the allocation system authorizes or makes it easier for American to select customers unlawfully or improperly, and substantial limitations have been placed upon American's discretion to ensure against unjust discretion.

Although the system now agreed to is to operate until December 31, 1984, there is no requirement that American

continue to operate overnight service; the system is applicable only if American chooses to continue to offer such a service, and if demand for reserved positions on the service exceeds supply. If, however, unexpected contingencies arise, or American believes that it or its customers have become unduly burdened by this allocation method, our order expressly provides that American can apply to the Board for appropriate modifications. Moreover, we will look favorably upon such an application if American can demonstrate that this method of allocating reserved space is unduly hindering the profitability of its flight, since our intention in issuing this order is not to intrude upon the exercise of American's business judgment within the limits of the law.

ACCORDINGLY,

1. We approve the settlement agreed to by American Airlines, Inc. and the Bureau of Compliance and Consumer Protection.

2. American Airlines, Inc. is ordered to cease and desist from engaging in any unjust discrimination against forwarders, within the meaning of section 404(b) of the Act, in its allocation of reserved "A" container positions on its overnight all-cargo service between New York and San Juan.

3. American shall deliver to the Director, Bureau of Compliance and Consumer Protection, a check or draft made payable to the Treasurer of the United States in the amount of $50,000 within 7 days of the date this order becomes a final order of the Board.

4. American shall follow the procedures set out in Appendix B to this order until December 31, 1984 in allocating reserved "A" container positions on its overnight all-

cargo service from New York to San Juan. American may apply to the Board at any time for modification of this procedure, and such modification shall be granted upon a showing (i) that the procedure is unduly hindering the profitability of American's service and is unnecessary to prevent unjust discrimination or the effects of any past unjust discrimination; or (ii) that modification is warranted by changes in applicable law or regulations.

5. This order is issued by authority delegated in 14 C.F.R. 385.11. Persons entitled to petition the Board for review of this order under Board regulations, 14 C.F.R. 385.50, shall file their petitions within 10 days of the date of service of this order. This order shall be effective as final action of the Civil Aeronautics Board after the 10 day period, unless a timely petition for review is filed or the Board takes review on its own within that period.

6. This proceeding is terminated.

By John M. Vittone
Administrative Law Judge

PHYLLIS T. KAYLOR
Secretary

(SEAL)

The Settlement Agreement:

Appendix "A"—Memorandum of Agreement
Appendix "B"—Allocation System
is annexed to APPENDIX 2 hereof (Board Order No. 81-7-138) (July 29, 1981)

APPENDIX 4

Petitioner's Appendix of Statutory Texts.

CIVIL AVIATION ACT OF 1958, AS AMENDED, INCLUSIVE OF THE AIRLINE DEREGULATION ACT OF 1978

Section 102 (a) (7); 49 U.S.C. § 1302 (a) (7):

"*§ 102. Consideration of matters in public interest by Board*

Factors for interstate, overseas, and foreign air transportation

(a) In the exercise and performance of its powers and duties under this chapter, the Board shall consider the following, among other things, as being in the public interest, and in accordance with the public convenience and necessity:

• • • •

(7) The prevention of unfair, deceptive, predatory, or anticompetive practices in air transportation, and the avoidance of—

(A) unreasonable industry concentration, excessive market domination, and monopoly power; and

(B) other conditions;

that would tend to allow one or more air carriers or foreign air carriers, unreasonably to increase prices, reduce services, or exclude competition in air transportation."

As amended Pub. L. 95-504, § 3(a), (b) Oct. 4, 1978, 92 Stat. 1705, 1707.

Appendix 4

Section 404 (a) and (b); 49 U.S.C. § 1374 (a) and (b):

"§ 404. Rates for carriage of persons and property; duty to provide service, rates, and divisions; foreign air transportation rates; discrimination

(a) (1) It shall be the duty of every air carrier to provide and furnish interstate overeas air transportation, as authorized by its certificate, upon reasonable request therefor and to provide reasonable through service in such air transportation in connection with other air carriers; to provide safe and adequate service, equipment, and facilities in connection with such transportation; to establish, observe and enforce just and reasonable individual and joint rates, fares and charges, and just and reasonable classifications, rules, regulations and practices relating to such air transportation; and, in case of joint rates, fares charges, to establish just, reasonable, and equitable divisions thereof as between air carriers participating therein which shall not unduly prefer or prejudice any of such participating air carriers.

(2) It shall be the duty of every air carrier and foreign air carrier to establish, observe, and enforce just and reasonable individual and joint rates, fares, and charges, and just and reasonable classifications, rules, regulations, and practices relating to foreign air transportation; and, in case of such joint rates, fares, and charges, to establish just, reasonable, and equitable divisions thereof as between air carriers and foreign air carriers participating therein which shall not unduly prefer or prejudice any of such participating air carriers or foreign air carriers.

(b) No air carrier or foreign air carrier shall make, give, or cause any undue or reasonable preference or advantage to any particular person, port, locality, or descrip-

tion of traffic in air transportation in any respect whatsoever or subject any particular person, port, locality, or description of traffic in air transportation to any unjust discrimination or any undue or unreasonable prejudice or disadvantage in any respect whatsoever."

Pub. L. 85-726, Title IV, § 404, Aug. 23, 1957, 72 Stat. 760; Pub.L. 92-259, § 1, Mar. 22, 1972, 86 Stat. 95.

1978 amendment of § 404 (a) (1) of the Act

"*§ 404. Rates for carriage of persons and property; duty to provide service, rates, and divisions; foreign air transportation rates; discrimination*

(a) (1) It shall be the duty of every air carrier to provide and furnish interstate and overseas air transportation, as authorized by its certificate upon reasonable request therefor and to provide reasonable through service in such air transportation in connection with other air carriers authorized to engage in schedule air transportation by certificate or by exeption under section 416 (b)(3) of this title; to provide safe and adequate service, equipment, and facilities in connection with such transportation; to establish, observe, and enforce just and reasonable individual and joint rates, fares, and charges, and just and reasonable classifications, rules, regulations, and practices relating to such air transportation, and, in case of such joint rates, fares and charges, to establish just, reasonable and equitable divisions thereof as between air carriers participating therein which shall not unduly prefer or prejudice any such participating air carriers."
As amended Pub.L. 95-504, § 23, Oct. 24, 1978, 92 Stat. 1724.

Appendix 4

Section 411; 49 U.S.C. § 1381:

"§ 411 Methods of competition

The Board may, upon its own initiative or upon complaint by any air carrier, foreign air carrier, or ticket agent, if it considers that such action by it would be in the interest of the public, investigate and determine whether any air carrier, foreign air carrier, or ticket agent has been or is engaged in unfair or deceptive practices or unfair methods of competition in air transportation or the sale thereof. If the Board shall find, after notice and hearing, that such air carrier, foreign air carrier, or ticket agent is engaged in such unfair or deceptive practices or unfair methods or competition, it shall order such air carrier, foreign air carrier, or ticket agent to cease and desist from such practices or methods of competition."
Pub.L. 85-726, Title IV, § 411, Aug. 23, 1958, 72 Stat. 769
Section 412: 49 U.S.C. § 1382

(Old text superseded Oct. 24, 1978)

"§ 412. Pooling and other agreements; filing; approved by Board

(a) Every air carrier shall file with the Board a true copy, or, if oral, a true and complete memorandum, of every contract or agreement (whether enforceable by provisions for liquidated damages, penalities, bonds or otherwise) affecting air transportation and in force on the effective date of this section or hereafter entered into, or any modification or cancellation thereof, between such air carrier and any other air carrier, foreign air carrier, or other carrier for pooling or apportioning earnings, losses, traffic, service, or equipment, or relating to the establishment of transportation rates, fares, charges, or classifications, or for preserving and improving safety, economy,

and efficiency of operation, or for controlling, regulating, preventing, or otherwise eliminating destructive, oppressive or wasteful competition, or for regulating stops, schedules, and character of service, or for other cooperative working arrangements.

(b) The Board shall by order disapprove any such contract or agreement, whether or not previously approved by it, that it finds to be adverse to the public interest, or in violation of this chapter, and shall by order approve any such contract or agreement, or any modification or cancellation thereof, that it does not find to be adverse to the public interest, or in violation of this chapter; except that the Board may not approve any contract or agreement between an air carrier not directly engaged in the operation of aircraft and a common carrier subject to the Interstate Commerce Act, as amended, governing the compensation to be received by such common carrier for transportation services performed by it."

Pub.L. 85-726, Title IV, § 412, Aug. 23, 1958, 72 Stat. 770.

(New text, enacted October 24 1978)

"§ 412. *Pooling and other agreements; filing and approval of agreements*

(a) (1) Any air carrier or foreign air carrier may file with the Board a true copy, or, if oral, a true and complete memorandum, of any contract or agreement (whether enforceable by provisions for liquidated damages, penalties, bonds, or otherwise), or a request for authortiy to discuss possible cooperative working arrangements in force on October 24, 1978, or thereafter entered into, or any modification or cancellation thereof, between such air carrier or foreign air carrier and any other air carrier, foreign air carrier, or other carrier.

(2) (A) The Board shall by order disapprove any contract, agreement, or request filed pursuant to para-

graph (1) of this subsection, whether or not previously approved by it, that it finds to be adverse to the public interest or in violation of this chapter, and shall by order approve any contract, agreement, or request, or any modification or cancellation theerof that it does not find to be adverse to the public interest, or in violation of this chapter, except that—

(i) The Board may not approve or, after periodic review, continue its approval of any such contract, agreement, or request, or any modification or cancellation thereof, which substantially reduces or eliminates competition, unless it finds that the contract, agreement, or request is necessarry to meet a serious transportation need or to secure important public benefits, including international comity or foreign policy considerations, and it does not find that such need can be met or such benefits can be secured by reasonably available alternative means having materially less anticompetitive effects;

(ii) the Board may not approve any contract or agreement between an air carrier not directly engaged in the operation of aircraft in air transportation and a common carrier subject to the Interstate Commerce Act, as amended, governing the compensation to be received by such common carrier for transportation services performed by it; and

(iii) the Board may not approve any such contract or agreement, affecting interstate or overseas transportation, or any modification or cancellation in markets in which they compete, that fixes rates, fares or charges between or among air carriers (Except for joint rates, fares or charges).

(B) In any proceeding before the Board involving the application of the standards set forth in subparagraph (A)(1) of this paragraph the party opposing the proposed contract, agreement, or request shall have the burden of

aproving the reduction or elimination of ocmpetition, and the availability of alternative means having less anticompetitive effects, and the party defending the proposed contract, agreement, or request shall have the burden of proving transportation need or public benefits.

(C) The findings required by subparagraph (A) (1) of this paragraph shall be included in any order of the Board approving or disapproving any contract or agreement or any memorandum of any contract or agreement, or any modification or cancellation thereof, or any request.

Proceedings upon filing

(b) Upon the filing of any contract or agreement, or any modifiiation or cancellation thereof, or any request for authority to discuss possible cooperaative working arrangements, pursuant to subsection (a) of this section, the Board, in accordance with regulations which it prescribes, shall provide to the Attorney General the Secretary of State, and the Secretary of Transportation written notice of, and an opportunity to submit written comments on, the filed document. The Board may, upon its own initiative or if requested by the Attorney General or either Secretary hold a hearing, in accordance with regulations prescribed by the Board, to determine if a contact or agreement, or request for discussion authority, whether or not previously approved is consistent with the provisions of this chapter.

Mutual aid agreements"

[This sequence of subsections deals with mutual aid for strikebound airlines and is omitted]

As amended Pub.L. 95-504, secs. 28(a)(2), (b), (c), 29 (a), Act. 24, 1978, 92 Stat. 1729, 1730; Pub.L. 96-192, sec. 11, Feb. 6, 1980, 94 Stat. 39.

(Old text, superseded October 24, 1978)

Appendix 4

Section 414; 49 U.S.C. § 1384

" § 414. Legal restraints

Any person affected by any order made under sections 408, 409, or 412 of this title shall be, and is hereby, relieved from the operations of the 'antitrust laws', as designated in section 12 of Title 15, and of all other restraints or prohibitions made by, or imposed under, authority of law, insofar as may be necessary to enable such person to do anything authorized, approved, or required by such order."

Pub.L. 85-726, Title IV, § 414 Aug. 23, 1958, 72 Stat. 770

(New text, enacted October 24 1978)

§ 414. Antitrust exemption

In any order made under section 408, 409, or 412 of this title, the Board may, as part of such order, exempt any person effected by such order from the operations of the 'antitrust laws' set forth in subsection (a) of section 12 of Title 15 to the extent necessary to enable such person to proceed with the transaction specifically approved by the Board in such order and those transactions necessarily contemplated by such order, except that the Board may not exempt such person unless it determines that such exemption is required in the public interest. Notwithstanding the preceding sentence, on the basis of the findings required in subsection (a)(2)(A)(i) of section 412 of this title, the Board shall, as part of any order under such section which approves any contract, agreement or request or any modification or cancellation thereof, exempt any person affected by such order from the operations of the 'anti-trust laws' set forth in subsection (a) of section 12 of title 15 to the extent necessary to enable such person to proceed with the transaction specifically ap-

proved by the Board in such order and with those transactions necessarily contemplated by such order.

As amended Pub.L. 95-504, § 30(a), Oct. 24, 1978, 92 Stat. 1731; Pub.L. 96-192, § 27, Feb. 15, 1980, 94 Stat. 47.

Sherman Antitrust Act of 1890, as amended

Section 1; 15 U.S.C. § 1

"§ 1. Trusts, etc., in restraint of trade illegal; penalty

Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is declared to be illegal. Every person who shall make any contact or engage in any combination or conspiracy hereby declared to be illegal shall be deemed guiilty of a felony, and, on conviction thereof, shall be punished by fine not exceeding one million dollars if a corporation, or, if any other person, one hundred thousand dollars or by imprisonment not exceeding three years, or by both said punishments, in the discretion of the court."

As amended Dec. 21, 1974, Pub.L. 93-528, § 3, 88 Stat. 1708; Dec. 12, 1975, Pub.L. 94-145, § 2, 89 Stat. 801.

Section 2; 15 U.S.C. § 2

"2. Monopolizing trade a felony; penalty

Every person who shall monopolize, or attempt to monopolize, or combine or conspire with any other person or persons, to monopolize any part of the trade or commerce among the several States, or with foreign nations, shall be deemed guilty of a felony, and, on conviction thereof, shall be punished by fine not exceeding one million dollars if a corporation, or, if any other person, one hundred thousand dollars or by imprisonment not exceeding three years, or by both said punishments, in the disretion of the court."

Appendix 4

As amended Dec. 21, 1974, Pub. 1 93-528, § 3, 88 Stat. 1708. 1708.

Administrative Procedures Act, 5 U.S.C. § 706

"§ 706. Scope of review

To the extent necessary to decision and when presented, the reviewing court shall decide all relevant questions of law, interpret constitutional and statutory provisions, and determine the meaning or applicability of the terms of an agency action. The reviewing court shall—

(1) compel agency action unlawfully withheld or unreasonably delayed; and

(2) hold unlawful and set aside agency action, findings, and conclusions found to be—

(A) arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law;

(B) contrary to constitutional right, power, privilege, or immunity;

(C) in excess of statutory jurisdiction, authority, or limitations, or short of statutory right;

(D) without observance of procedure required by law;

(E) unsupported by substantial evidence in a case subject to section 556 and 557 of this title or otherwise reviewed on the record of an agency hearing provided by statute; or

(F) unwarranted by the facts to the extent that the facts are subject to trial de novo by the reviewing court.

In making the foregoing determinations, the court shall review the whole record or those parts of it cited by a party, and due account shall be taken of the rule of prejudicial error."

APPENDIX 5

Motion to Law Judge for Approval of Settlement.

BEFORE THE
CIVIL AERONAUTICS BOARD
WASHINGTON, D.C.

Docket 37278

Aug. 12, 1980

AMERICAN AIRLINES, INC.
NEW YORK-SAN JUAN CARGO SERVICE

Enforcement Proceeding

MOTION TO APPROVE SETTLEMENT

The Bureau of Consumer Protection ("Bureau") and American Airlines, Inc. ("American") have reached an agreement for settling this proceeding. The Bureau hereby asks the Administrative Law Judge, under the authority delegated in 14 C.F.R. 385.11, to approve the settlement by issuing the attached Consent Order.

The Bureau's complaint alleges that American has violated section 404(b) of the Federal Aviation Act by unjustly discriminating against Century Air Freight Inc. ("Century") and other air freight forwarders in allocating space on its New York-San Juan prime time cargo flight since late in 1971, shortly after the flight began. Specifically, the Bureau alleges that American granted some forwarders open-ended reservations for all desirable positions on its flight—namely, the twelve main deck "A" container positions—and then refused to grant reservations to any other forwarders until one of those holding a reservation relinquished it. Since demand for the reserved positions consistently exceeded supply, very few forward-

ers have relinquished reservations during the entire history of the flight. Indeed, the same three forwarders occupied all of the reserved positions for seven years, until one of them—Shulman Air Freight—released its positions in 1978. The Bureau contends that this indefinite preference for some forwarders for a prolonged period of time, and indefinite exclusion of others, violate section 404(b). The Bureau also alleges that American's manner of allocating space on this fight caused public injury by preventing development of a fully competitive freight forwarding service in this market.

In response to the Bureau's contentions (which are set out more fully in the Consent Order), American argues that its practice in allocating reserved "A" container positions on Flight No. 841—which American calls "Confirmed Air Freight"—are necessary to permit shippers to engage in efficient planning and to permit American to insure maximum utilization of its fight. American describes its Confirmed Air Freight as an understanding between the shipper and carrier that an agreed-upon volume of freight will be tendered on a regular basis and that normally space will be held on the fight for the carriage of that freight. There is no penalty if freight is not tendered or if it is not carried as anticipated, and the understanding is terminable at will by either party.

Americn contends that this practice is the same as the reserved air freight practice considered on several prior occasions by the Board without any finding of illegality, and that it is used widely in the industry. American asserts that it is not required to displace customers utilizing positions on the flight simply in order to accommodate a newcomer. American also alleges that there are other flights competitive with Flight No. 841, and that a forwarder's inability to obtain a Confirmed Air Freight position on Flight No. 841 would not signficantly injure that forwarder or freight forwarding competition between New York and San Juan.

Appendix 5

American states that it offered Confirmed Air Freight space on its overnight freighter on a first-come, first-served basis, that Century was offered space in 1971 on such a basis and rejected it, and that Century's subsequent requests for recurring reservations of space could not be satisfied by American because the flight had been filled. American contends that freight which it has carried for Century has been subject to no greater recovery time or higher frequency of loss than that experienced by other shippers using container space on the flight.

American also asserts that the allocation of a significant number of southbound positions on Flight No. 841 to Profit By Air—which has regularly utilized eight reserved positions—is necessary to maintain he flight, since Profit By Air also provides American with a significant quantity of northbound, return-flight freight. While there is generally a sufficient level of southbound freight, northbound freight is more scarce. Without Profit By Air's round-trip business, American argues, it would be unable to operate the flight economically. American alleges that if Profit By Air were offered less space than it now holds on the souhbound flight, it would charter its own aircraft or find other alternative lift. Thus, American contends that its system of allocating space on Flight No. 841 is economically necessary to maintain the flight and to retain its customers.

For the purpose of reaching a settlement and final disposition of the issues involved here and to avoid further litigation, American has entered into the attached Memorandum of Agreement, in which it agrees not to contest the facts alleged in the Bureau's complaint, and the facts, inferences and legal conclusions stated in the Consent Order. American also agrees to entry of the Consent Order itself; expressly acknowledges and agrees to be bound by the provisions of the Order, which both restrain it from engaging in certain practices regarding

allocation of reserved "A" container space on its New York-San Juan overnight all-cargo service, and require it to undertake affirmative duties regarding such practices; and agrees to pay $50,000 in civil penalties, in full settlement of all violations described in the Bureau's complaint and the Order. American has also waived its right to submit further comments on the settlement except to respond to comments submitted by others.

In the Bureau's judgment, the settlement is in the public interest, brings to a satisfactory conclusion a complex and lengthy enforcement proceeding, and should be approved. The cease and desist portion of the Consent Order enjoins American from engaging in unjust discrimination against forwarders in its allocation of reserved "A" container positions on its overnight all-cargo service between New York and San Juan. The Order also requires American to implement an allocation system—originally proposed by American—which we believer will remedy the effects of American's discriminatory practice on the market, guarantee a fair opportunity to all shippers to compete for access to American's service, and also meet American's legitimate business needs.

Under the method of allocation required by the Order, American will: (1) grant all forwarders and shippers which will regularly utilize at least one container position on the less sought after northbound return leg of the flight at least one reserved container position on the southbound, New York-San Juan segment; (2) allocate the remaining positions on the southbound segment according to criteria which take into account American's need for northbound shipments and other factors affecting American's revenue yield between New York and San Juan; and (3) review and issue or reissue such allocations once a year. Although the Order requires American to follow this method of allocation until December 31, 1984, it does not require

American to continue to operate overnight service between New York and San Juan; the allocation system is required only if American chooses to offer such a service, and if demand for reserved positions on the service continues to exceed supply.

This settlement agreement is consistent with the initial referral of this matter to the Board, which occurred after Century filed a private action against American in Federal District Court in New York, alleging that American violated the Sherman Act and the Federal Aviation Act in excluding it from this flight. American and Century stipulated to a referral of the dispute to the Board and requested a stay of the judicial proceeding pending the Board's review. The Court approved the stipulation and granted the stay, without itself formally ordering referral to the Board or issuing any instructions to it. Even if the Court had formally referred this matter to the Board, however, the Board would retain its normal discretion to determine whether to institute an enforcement action, or to proceed in some other manner. *See Alaska Airlines, Inc.* v. *Western Airlines, Inc. and Northwest Airlines, Inc.*, Order 77-9-122, p. 4.

In its review of this matter, the Bureau considered possible violations by American of Section 403, 404 and 411 of the Act, as well as possible violations of the Sherman Act. The Bureau concluded that the public interest would be fully protected by pursuing a remedy under Section 404 only, and this settlement secures relief—including a modification of the allocation system initially challenged in the court action—in settlement of these Section 404 claims. By resolving the matter in this fashion, the Board will have more than satisfied its responsibilities under the primary jurisdiction doctrine.

Century has declined to enter into this settlement and has objected to the allocation system required by the Consent Order on the ground that it permits American too

much discretion in choosing customers. We believe that this objection is baseless. The allocation system represents a balance between the need to ensure that all forwarders and shippers—whether currently on the flight or not—have a fair and equal opportunity to compete, on the basis of economic considerations, for access to the American service, and the policy, under deregulation, of minimizing government interference with a carrier's exercise of its business discretion. American's discretion will be restricted, but in a manner acceptable to it and consistent with the economic realities of this market.

One key economic consideration in this market is directional imbalance; substantially more freight is shipped by air southbound than northbound, and therefore obtaining the relatively scarce northbound shipments is important to operating a profitable round-trip flight. The allocation system accommodates this economic factor, and guarantees fair access to the American service, by providing that anyone who can regularly provide American at least one daily northbound container will be granted a southbound position. Competition for space on the flight is further facilitated by limiting all allocations of reserved positions to one year, and providing that American will review all applications for space and issue or reissue all allocations on a yearly basis. Beyond the initial guarantee that anyone providing northbound shipments will be given one reserved southbound allocation, the allocation system permits American to select customers based upon factors directly related to profitability, including solicitation of northbound shipments and density and type of goods to be tendered.

Nothing in this system authorizes or makes it easier for American to engage in unlawful discrimination or improper selection of customers. American has made a substantial concession to facilitating competition among forwarders in this market by agreeing to restrict alloca-

tions of reserved space to one year and to grant all forwarders who can provide northbound shipments at least one southbound position on its flight. Furthermore, since it is not anticipated that the initial grant of one southbound position too each shipper providing northbound shipments will fill the southbound flight, American is required to select additional customers based upon factors which reflect the economic features of this market. Additional restriction on American's discretion, we believe, would be both unnecessary and unwarranted.

WHEREFORE, the Bureau requests that the settlement be approved under delegated authority by issuance of the attached Consent Order, the terms of which have been negotiated and agreed to by American and the Bureau, and that this proceeding be terminated.*

Respectfully submitted,

REUBEN B. ROBERTSON
Reuben B. Robertson
Director
Bureau of Consumer Protection

JAMES D. TUSSING
James D. Tussing
Senior Trial Attorney
Bureau of Consumer Protection

DAYTON LEHMAN, JR.
Dayton Lehman, Jr.
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Bureau of Consumer Protection

August 12, 1980

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* See PR-217 and OR-160, revising the procedures for settlement of enforcement proceedings, effective December 28, 1979.

The settlement agreement submitted with the motion papers and consisting of Appendix "A"—Memorandum of Agreement, and Appendix "B"—Allocation System, is identical with Appendices "A" and "B" set forth in APPENDIX 2 of this petition.

APPENDIX 5 (ANNEX)

Proposed Consent Order Annexed to Motion

UNITED STATES OF AMERICA
CIVIL AERONAUTICS BOARD
WASHINGTON, D. C.

Issued under Delegated Authority

Docket 37278

AMERICAN AIRLINES, INC.
NEW YORK-SAN JUAN CARGO SERVICE

Enforcement Proceeding

CONSENT ORDER

The Bureau of Consumer Protection ("Bureau") commenced this proceeding on December 14, 1979, alleging that American Airlines, Inc. ("American") violated section 404(b) of the Federal Aviation Act by unjustly discriminating against various air freight forwarders in allocating space on its New York-San Juan overnight cargo flight, currently designated American's Flight No. 841. The Bureau alleged that American's manner of allocating space on this flight caused public injury by preventing development of a fully competitive freight forwarding service between New York and San Juan. The complaint requested that American be ordered to cease and desist from allocating space on Flight No. 841 in an unjustly discriminatory manner, to institute reasonable allocation practices with respect to main deck "A" container space on this flight, and to pay civil penalties. American answered denying the substantive allegations of the Bureau's complaint and specifically denying any violations of the Act.

Appendix 5

On August 12, 1980, prior to any adjudication of facts, American and the Bureau entered into a memorandum of agreement (Appendix A to this Order) to settle this matter without the need for further litigation. American has not admitted any of the allegations of the Bureau's complaint; but solely for the purposes of settlement, American has agreed for this proceeding not to contest the allegations stated in the Bureau's complaint or the findings and conclusions set forth in this Consent Order. American has also agreed, for purposes of settlement, to adopt the proposed allocation procedures set forth in Appendix B to this Consent Order. The statement of those procedures in Appendix B is controlling, but they can be summarized as follows. American will: (1) grant all forwarders and shippers which will regularly utilize at least one "A" container position on the less desirable northbound return segment of the flight at least one reserved container position on the northbound, New York-San Juan segment; (2) allocate the remaining positions on the southbound segment, if any, according to the criteria set out in Appendix B; and (3) review and issue or reissue such allocations once a year. American has also agreed to pay $50,000 in full settlement of any civil penalty liability.

The Bureau alleges the facts to be as follows. Since 1971, American has operated the only regularly scheduled, overnight all-cargo service on week nights from New York to San Juan (originally designated Flight No. 801, now Flight No. 841. Access to this service is desirable for air freight forwarders competing, or seeking to compete, on this route because the flight is scheduled so that shippers in New York can have next morning delivery in San Juan. However, since 1971, various forwarders have held allocations of indefinite duration for all twelve of the main deck "A" type cargo container positions in the Boeing 707 aircraft American has used in this opera-

tion. From late 1971 through mid-1978, all twelve such positions available were allocated to three forwarders—eight to Profit By Air, Inc., three to Shulman Air Freight, and one to Emery Air Freight. In August 1978, when Shulman withdrew from this route, seven forwarders asked American to take Shulman's place, seeking a total of between nine and eleven positions. The three Shulman positions were subsequently divided among Air Express International Corporation, Burlington Northern Air Freight, Inc., and Bor-Air Freight.

The Bureau has further alleged that during the period from 1971 to 1977, Century Air Freight, Inc. ("Century"), an air freight forwarder based in New York, made numerous requests for positions on American's flight. Each Century request during that period for an indefinite allocation of "A" container space was denied on the ground that all available space was committed. In May 1977, Century sued American in Federal District Court in New York, claiming that American had engaged in an unlawful restraint of trade in violation of the Sherman Act by agreeing with Profit By Air to deny Century space, and that American's actions also violated the Federal Aviation Act. In September 1977, American allocated Century the equivalent of one "A" container position on Flight No. 841. However, Century contends that its freight has often been broken out of its container and fitted into whatever space is available on the aircraft, subjecting Century to greater recovery time and higher frequency of loss than if its freight were containerized. In August 1978, Century sought unsuccessfullly at least one of the three Shulman positions then available.

This matter came to the Bureau's attention when American and Century stipulated that certain issues should be referred to the Board under the doctrine of primary jurisdiction. At the parties' request, the District Court stayed

further judicial proceedings pending action by the Board on Century's complaint. Following an investigation, the Bureau filed its complaint in this proceeding.

The complaint alleges specifically that since American began its overnight all-cargo service from New York to San Juan in 1971, American has allocated to a few forwarders all the desirable positions on these flights—namely the main deck "A" container positions—for an indefinite period. When American allocates such a position to a forwarder, that forwarder has a right to the position as against any other forwarder, until such time as American or the forwarder alters the arrangement. Such alterations are rare, however, From late 1971 to mid-1978, the same three forwarders held all twelve standard main deck "A" container positions on the flight. The Bureau contends that this indefinite preference for some forwarders for an extensive period of time, and indefinite exclusion of others seeking the American service, violates section 404(b).

American has denied any violation of section 404(b) and has raised affirmative defenses to the Bureau's complaint. American does not admit the legal or factul contentions of the Bureau. However, for the purposes of settling this proceeding, and subject to the conditions and limitations of the memorandum of agreement, American consents to the entry of this Consent Order.

Therefore, on the basis of the Bureau's factual and legal contentions, and American's agreement not to contest them in this proceeding, we find that American violated section 404(b) in its indefinite allocations of space on Flight No. 841. *Transcontinental Bus System, Inc.* v. *C.A.B.*, 383 F.2d 466 (5th Cir. 1967), *cert. denied*, 390 U.S. 920 (1968); *Emery Air Freight and Air Midwest, Inc.*, Order 73-4-8 (April 2, 1973). We also find that the allocation system which American has agreed to implement in order to settle this proceeding will provide a fair reso-

lution of this particular case. It addresses whatever effects American's practice might have had on the route, gurantees a fair opportunity to all shippers to compete for access to American's service, and is also tailored to meet American's legitimate business needs. The system limits all reservations to one year and requires American to consider applications each year from all forwarders and shippers using basically the same criteria, regardless of whether they have previously held reservations on the flight. All shippers who tender shipments for the relatively less sought after northbound segment will be guaranteed at least one reserved southbound position, and all remaining positions will be allocated according to criteria which take into account this and other factors affecting American's likely yield.

Although the system now agreed to is to operate until December 31, 1984, there is no requirement that American continue to operate overnight service; the system is applicable only if American chooses to continue to offer such a service, and if demand for reserved positions on the service exceeds supply. If, however, unexpected contingencies arise, or American believes that it or its customers have become unduly burdened by this allocation method, our order expressly provides that American can apply to the Board for appropriate modifications. Moreover, we will look favorably upon such an application if American can demonstrate that this method of allocating reserved space is unduly hindering the profitability of its flight, since our intention in issuing this order is not to intrude upon the exercise of American's business judgment within the limits of the law.

ACCORDINGLY,

1. We approve the settlement agreed to by American Airlines, Inc. and the Bureau of Consumer Protection.

2. American Airlines, Inc. is ordered to cease and desist from engaging in any unjust discrimination against forwarders, within the meaning of section 404(b) of the Act, in its allocation of reserved "A" container positions on its overnight all-cargo service between New York and San Juan.

3. American shall deliver to the Director, Bureau of Consumer Protection, a check or draft made payable to the Treasurer of the United States in the amount of $50,000 within 7 days of the date this order becomes a final order of the Board.

4. American shall follow the procedures set out in Appendix B to this order until December 31, 1984 in allocating reserved "A" container positions on its overnight all-cargo service from New York to San Juan. American may apply to the Board at any time for modification of this procedure, and such modification shall be granted upon a showing (i) that the procedure is unduly hindering the profitability of American's service and is unnecessary to prevent unjust discrimination or the effects of any past unjust discrimination; or (ii) that modification is warranted by charges in applicable law or regulations.

5. This order is issued by authority delegated in 14 C.F.R. 385.11. Persons entitled to petition the Board for review of this order under Board regulations, 14 C.F.R. 385.50, shall file their petitions within 10 days of the date of service of this order. This order shall be effective as final action of the Civil Aeronautics Board after the 10 day period, unless a timely petition for review is filed or the Board takes review on its own within that period.

6. This proceeding is terminated.

By Henry M. Switkay
Administrative Law Judge

PHYLLIS T. KAYLOR
Secretary

(SEAL)

APPENDIX 6

Century's Petition to CAB, May 1, 1981, for Review of Law Judge's Order, Annexing "Comments" in Opposition to Motion to Approve Settlement.

BEFORE THE
CIVIL AERONAUTICS BOARD
WASHINGTON, D.C.

Docket 37278

AMERICAN AIRLINES, INC.
NEW YORK-SAN JUAN CARGO SERVICE

Enforcement Proceeding

CENTURY AIR FREIGHT, INC., a party herein, hereby petitions the Civil Aeronautics Board, pursuant to 14 C.F.R. 385.50, for review of the Consent Order herein of Hon. John M. Vittone, Administrative Law Judge.

1. The ground for this petition is that the Consent Order embodies a premise that is, in a fundamental way, contrary to law and involves a substantial and important question of policy, in that

A. Contrary to and violative of the common carrier status fastened on all-cargo air carriers by section 1002(k) of the Act and the concomitant obligation of American Airlines, Inc. to carry, at uniform rates for the same classes and quantities, such goods offered for shipment by the shipping public as are within the categories of goods it ordinarily carries, the Consent Order with its Appendix B subjective criteria requiring only American's consideration of applications, permits, allows to continue, and validates an illegal,

unbridled exercise of customer selection and rejection on the part of American, save for American's obligation to furnish one southbound container allocation to each steady northbound shipper of one or more containers, all in violation of § 404(b) of the Act, and of § 411 of the Act.

B. In violation of sections 1 and 2 of the Sherman Antitrust Act, the "essential facility" doctrine enunciated in *Hecht* v. *Pro-Football, Inc.*, 570 F. 2d 982 (D.C. Cir. 1977), certiorari denied, 436 U.S. 956 (1978) and, consequently, § 411 of the Act, the foregoing grant by the Consent Order to American of a practical right of customer selection, gives American the absolute right, save for the one container southbound allocation for qualifying northbound shippers, to exclude any member of the shipping public from its essential facility.

C. The Consent Order would validate the prior exclusionary and discriminatory practices of customer selection and rejection upon which this Civil Aeronautics Board complaint was issued, in that it requires no change whatsoever in the anticompetitive practices of American which had prompted the issuance of the complaint herein; and the southbound allocation for northbound shippers makes no change in the actual practices prevailing at the beginning of this proceeding.

2. For purposes of augmentation of the allegations of this petition, the annexed "Comments of Century Air Freight, Inc. in Opposition to Motion to Approve Settlement" are incorporated into this petition and made a part hereof. The "comments" also show that the matter adduced in this petition is not new, but was brought to the attention of Board personnel at the staff action level.

WHEREFORE we respectfully request that the Civil Aeronautics Board grant review of the Consent Order herein.

Dated: New York, New York
May 1st, 1981

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APPENDIX 6 (ANNEX)

"Comments" of Century in Opposition to Motion

BEFORE THE
CIVIL AERONAUTICS BOARD
WASHINGTON, D.C.

Docket 37278

AMERICAN AIRLINES, INC.
NEW YORK-SAN JUAN CARGO SERVICE

Enforcement Proceeding

COMMENTS OF CENTURY AIR FREIGHT, INC. IN OPPOSITION TO MOTION TO APPROVE SETTLEMENT

Century Air Freight, Inc. is opposed to this motion to approve the proposed settlement between the Bureau of Consumer Protection (BCP) and American Airlines, Inc. (American) because we think the proposal is fundamentally and irretrievably illegal; an out and out program of a right of unbridled customer selection by American as a direct air carrier in head-on conflict with both the strong *common carrier* identity fastened upon the all-cargo air carriers by Congress in its 1977 enactment for the regime of deregulation, 49 U.S.C. § 1482 (k); § 1002 (k) of the Act, and the antitrust interdiction, under §§ 1 and 2 of the Sherman Act, found in the "essential facility" doctrine perhaps best enunciated in *Hecht* v. *Pro-Football, Inc.*, (D.C. Cir. 1977) 570 F. 2d 982, certiorari denied, 436 U.S. 956 (1978) which we feel, especially in the case of a statutory common carrier, is unimmunizable under § 414 of the Act. In this latter connection of a relevant market of confirmed air freight traveling from New York City to San Juan on regularly scheduled cargo service, it is patent that American's Flight 841 service constitutes a facility es-

sential to successful operations in this market. Since, as a practical matter, air freight forwarders simply cannot duplicate these services, the available space must be allocated on fair terms reflecting proportionate shares of the recurring and steady demand therefor if a settlement here were to be compliant with the antitrust requirements of *Hecht*. It seems to us that a noncompliant arrangement such as the instant settlement proposes, would necessarily be violative of section 411 of the Federal Aviation Act.

Since our quarrel is fundamentally with the proposed settlement itself, seeking CAB sanction for future conduct which, it seems to us, is necessarily violative of Congressional mandate, we do not seek to raise any factual issues here. Nevertheless, to avoid the confusion of seeming agreement in important background matters where American and Century are at issue we point out the following:

a) Century denies the statement attributed to American on page 2 of the Motion,

> "• • • that it [American] offered Confirmed Air Freight space on its overnight freighter on a first-come, first-served basis, that Century was offered space in 1971 on such a basis and rejected it, and that Century's subsequent requests for recurring reservations of space could not be satisfied by American because the flight had been filled • • •"

and states that *never* did American offer space to Century on a first-come, first-serve basis—and in August 1978 when Shulman's demise opened three "A" container positions on Flight 841, the priority of Century's long-standing requests availed it nothing against three newcomers.

b) It is distortion by omission to say as page 2 of the Consent Order says, that the matter came to the CAB's attention by stipulation. The record fact is

that American as district court defendant moved dismissal of Century's court complaint on the ground that the CAB had exclusive jurisdiction of the matter, and that Century, instead of opposing, stipulated for the CAB to give the matter whatever attention it elected, if any, and the CAB advised the Court it had decided to accept primary jurisdiction referral and would investigate the matter, whereupon the Court stayed the action pending completion of CAB proceedings. But the plain fact remains that, but for American's primary jurisdiction motion, this matter would have proceeded in the district court without interruption and without referral to this agency.

c) Completely accurate is the Consent Order statement on page 2:

> "• • • In August 1978, Century sought unsuccessfully at least one of the three Shulman positions then available."

And it is the setting of that unsuccess, in August 1978 when the lawsuit had been commenced more than a year before with Century gaining a one-position allocation, *before* referral to the Board, aboard the much coveted Flight 841 and with the matter then eight months under investigation by the Board, that gave American the confident belief that it could, with legal safety, cut Century, now the second largest volume air freight forwarder in the New York-San Juan trade, and stop any further access to Flight 841 on its part.

The source of American's confidence was the coming suspension, to be effective November 9, 1978, of the decades old provision, under section 404 (a) of the Act, spelling out the essence of common carrierhood—the duty to carry on reasonable request. The Board's draft Memorandum of July 24, 1978 gave every indication that henceforth the

operator of aircraft would be free of this duty and therefore at liberty to pick and choose his customers—and exclude the unwanted.

Thus the Memorandum of July 24, 1978, pp. 14, 15:

> "The proposed exemption from section 404(a) of the Act would * * * relieve the carriers from the * * * requirement to carry 'upon reasonable request.'" (p. 14)

and at page 15 of the draft:

> "Our proposed exemption from the duty to carry on reasonable request is not based on our own inability to enforce the duty, but rather our tentative view that his 'duty', too, should be a matter of normal commercial decision-making rather than a thing determined under the law. The marketplace appears to function quite well in determining such matters as what kinds of foods are stocked by supermarkets * * * and we see no reason why a free-entry system will not work as well with domestic air freight.
>
> "The exemption from most of subsection 404(a) of the Act that we are here proposing does not, of course, extend to subsection 404(b), and we propose to continue our present authority to correct rates that are discriminatory, preferential, or prejudicial. * * *"

The draft Memorandum of July 24, 1978 preceded and undoubtedly formed the "legal" basis for American's anticipations of an administrative permissiveness towards its August 1978 denial of any space in the vacated Shulman block to Century. But a draft is only a draft.

The Board scheduled public hearings and argument on the proposed regulations for October 19, 1978, and Century's counsel addressed the Board (page 111 of the stenographic transcript)

> "I am here * * * to express concern, in the name of deregulation [over] the removal of the competitive

protection of common carrier status from 418, and I will say, in quotes, '[de] regulated' all-cargo carriers.

• • • •

"• • • At the same time, as has been pointed out, Congress has been very specific from the preamble on down through the modification of 102 in saying, no unjust discrimination, no undue preferences, no predatory practices, no discriminatory pricing, and I think that this Board owes it to the industry and to the public to go slow on a complete turnabout of what is a fundamental concept in keeping the competitive channels free and open."

Five days after the hearings of October 19, 1978, the 1978 deregulation enactments were signed into law.

The new Rules, Regulation ER-1080, issued on November 9th, 1978, while exempting cargo carriers from the duty to carry on reasonable request, not only explained a rather limited scope to that exemption, but gratifying and strongly preserved the common carrier status and obligations of scheduled all-freight air carriers. Thus at pages 11 and 12 of the new Regulations:

"Duty to Carry

"The Board is also exempting carriers in domestic cargo transportation from the duty under Section 404(a) of the Act to carry on reasonable request, for the reasons stated in EDR-359 (pp. 14-15). Many respondents opposed this exemption, claiming that the carriers would take advantage of their freedom from a legal duty to carry by refusing to transport outsized, perishable, and other kinds of cargo, such as live animals.

"This exemption, however, does not relieve the carriers of their service obligations as common carriers,

and does not appiy to a carrier's duty to refrain from providing preferential treatment to particular companies or persons. Carriers holding certificates under section 401 or *418* of the Act *remain, by definition, common carriers.* The statutory duty to provide service upon reasonable request is broader than the service obligations of a common carrier at common law. At common law, a carrier is permitted to hold itself out as a carrier of only a particular kind of freight, and it is not obligated to carry other types of cargo. This exemption, therefore, *only* ends the Board's role in regulating the *extent of the carrier's service offering,* • • •" (emphasis supplied)

It was *Congress'* vehement insistence upon fastening the obligation of a common carrier upon operators of commercial scheduled cargo carrying aircraft into the scheme of deregulation that prompted the Board, in its actual Regulation, to indicate how limited was the sweep of the suspension of 404 (a)'s "duty to carry on reasonable request". The text of subsection k, added to section 1002 of the Act in 1977 is annexed to these comments, and it is noteworthy that the phrase "common carrier" is used no less than 12 times in the subsection.

Section 102 of the Act, as amended and added to by Congress in 1977 and 1978, shows a clear and strong Congressional purpose in its deregulation scheme not to cast the industry adrift in a dog eat dog domain without brake on the ability of the strong to despoil the weak—ironically the most anticompetitive measure imaginable—but rather to give the Board a powerful and central role in keeping the channels of true competition free and open. Again and again, section 102, both for general and explicitly for all-cargo service, directs the Board to act against discrimination, preferences, and unfair or deceptive practices.

Appendix 6

The 1978 addition of subsection (7) to section 102 (a) of the Act could not be more explicit in describing a Board duty to preserve to the greatest extent possible freedom from restraint of access of the shipping public to carriage:

> "102 (a)(7). The preventation of unfair, deceptive, predatory, or anti-competitive practices in air transportation, and the avoidance of—
>
> (A) unreasonable industry concentration, excessive market domination, and monopoly power; and
>
> (B) other conditions;
>
> that would tend to allow one or more air carriers unreasonably to increase prices, reduce services, or exclude competition in air transportation. * * *".

and yet the Board is being asked to approve a settlement that, save for an inconsequential duty to match one Flight 841 "A" container allocation to those undertaking the steady use of one or more container positions on the northbound turnaround flight, reserves to American a complete and unlimited control in the selection of its customers—with a concomitant right of exclusion of those shippers whom American chooses, for any reason whatsoever, not to accommodate. The proposed settlement requires nothing of American that it has not been doing since September 1977 when it yielded the equivalent of one container position aboard Flight 841 to Century *before* the matter was referred to the Board. So much the Motion for Approval acknowledges:

> "* * * Beyond the initial guarantee that anyone providing northbound shipments will be given one reserved southbound allocation, the allocation system permits American to select customers based upon factors directly related to profitability, including solicitation of northbound shipments and density and type of goods to be tendered."

But, should Century desire additional container space

aboard Flight 841, paragraph 10 of the Memorandum of Agreement between American and BCP provides, whatever the euphemisms of expression, for a recognition of the possibility that Century may trade off its district court suit for additional space:

> "10. It is understood that American may, consistent with the requirements of the allocation system contained in Appendix B to the Consent Order, allocate reserved main deck 'A' container positions on Flight No. 841 to Century as part of any resolution of the private suit now pending between American and Century."

Many cynical people would read the foregoing in a practical way to mean that for Century—and for Century alone—more space aboard Flight 841 beyond one "A" container can be gotten *only* by trading off the suit.

We think that the notion underlying the proposed settlement is that maintaining the economic health—profitability—of an important actor in the industry, is the most important objective of deregulation. That may be so, but it is also a more paramount truism that a beneficial objective does not save that which is accomplished by an illegal means.

Whatever the areas of Board discretion, and in this agency they have been broad indeed, the outer limits are measured by the legislative grant. When Congress mentioned "common carrier" no less than 12 times in section 1002 (k), its new regulation for all-cargo carriers in the era of deregulation, it was not voicing some merely precatory desire on the part of a lay legislative body that could readily yield to the better advised expertise of an agency set up to handle the sort of problems that arise in this age of specialization. Rather it seems plain that Congress, by enacting section 1002 (k) and section 102 (a) (7) was

mandating to the Board the duty to preserve common carrier principles alive among the all-cargo carriers, i.e., to accommodate all shippers tendering the kinds of cargo American would carry, and where such demand exceeded the space, accommodating as equitably as possible, proportionately within the practicalities of a rule of reason, the allocations of available space. To these principles, the proposed settlement requires no change at all in American's existing practice other than to give wholly discretionary "consideration" to applications. The northbound container utilization requires giving no southbound shipper any more space allocations southbound than he already has. As before Profit By Air, the largest forwarder in the trade, has 8 main deck container positions, two-thirds of the allocable space, while Century, the second largest forwarder, has 1 container position, but it can get more if it gives American *quid pro quo* on the district court lawsuit. Of the three who succeeded Shulman, Air Express International, Burlington Northern and Bor-Air, Bor-Air has dropped out of the picture since its custom went over to Century. Still Bor-Air's position has not gone over to Century, and presumably the Bor-Air position is hanging in American's shop window waiting for a trade.

Thus it is apparent to us that the untrammeled right of customer selection reserved to American in the proposed settlement cannot be reconciled with permissible allocation procedures consistent with the statutory status of American, as operator of Flight 841, as a common carrier.

To approve it would, we feel, be violative of the Aviation Act and the Sherman Act. And the one thing an administrative agency cannot do is violate its own Act, *Federal Maritime Board* v. *Isbrandtsen*, 356 U.S. 481 (1958). And see *Seatrain Lines, Inc.* v. *Federal Maritime Commission*, 460 F. 2d 932, 935 (D.C. Cir. 1972).

We urge that the proposed agreement be disapproved, and that the parties thereafter be given an opportunity to work out a valid settlement.

Respectfully submitted,

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Dated: August 28, 1980

Annexed to the Comments was a marked copy of section 1002 (k) of the Act; 49 U.S.C. § 1482 (k).